# In the Supreme Court of the United States

**No. 78-35**

CITY OF SANTA CLARA, CALIFORNIA,
*Petitioner,*

vs.

JAMES R. SCHLESINGER, Secretary,
Department of Energy,
*Respondent,*

ROBERT L. McPHAIL, Administrator,
Western Area Power Administration,
*Respondent,*

and

PACIFIC GAS AND ELECTRIC COMPANY,
*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## Brief for Respondent Pacific Gas and Electric Company in Opposition

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### OPINIONS BELOW

The opinions below are set forth in the Petition.

### JURISDICTION

The jurisdictional requisites are set forth in the Petition.

### QUESTIONS PRESENTED

If the Court were to grant Santa Clara's petition for certiorari, the following questions would be presented for decision:

1. Is the decision to sell power from the Central Valley Project to one preference agency rather than another a decision "committed to agency discretion by law" within the meaning of section 5(a)(2) of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2)?

2. Does Administrative Procedure Act section 3(a)(1), 5 U.S.C. § 552(a)(1), which requires publication in the Federal Register of certain rules used by agencies, thereby require the promulgation of rules governing the making of power marketing decisions where none would otherwise be promulgated?

3. Does a municipality qualifying for preference in the sale of CVP power have a legitimate claim of entitlement to purchase such power warranting due process protection when the municipality has adequate alternative sources of power?

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Reclamation Project Act of 1939, the Flood Control Act of 1944, the Administrative Procedure Act and the Fifth Amendment of the United States Constitution are set forth in the Petition at pages 84a-90a.

## STATEMENT OF THE CASE

Respondent Pacific Gas and Electric Company ("PGandE") has itself filed a petition for certiorari seeking review of a portion of the same opinion of the Ninth Circuit Court of Appeals which the City of Santa Clara ("Santa Clara") also seeks to have reviewed. However, because the issues presented by the Santa Clara petition are not novel, were correctly decided by the court below, and were disposed of below in a manner consistent with the decisions of other Courts of Appeals and this Court, PGandE opposes Santa Clara's petition.

PGandE respectfully invites the Court's attention to the



Statement of the Case set forth at pages 5-10 of PGandE's Petition for Certiorari in No. 78-9 for a detailed statement of the facts of this case. With respect to the issues raised by the Santa Clara petition, the important points are that the controversy is one over the allocation of federal power by the Secretary of the Interior, acting through the Administrator of the Bureau of Reclamation*, among public agencies qualifying for "preference" in the sale of such power and that the only impact of an allocation decision is on the cost of power to a public agency. Adequate alternative power sources are under contract and immediately available to Santa Clara; they are merely more expensive than CVP power.

## ARGUMENT

Santa Clara urges a review of the Ninth Circuit's rulings that decisions by the federal government on the allocation of CVP power among preference customers are committed by law to agency discretion; that the provisions of section 3(a) of the Administrative Procedure Act requiring publication in the Federal Register of rules adopted by an agency did not require the promulgation of rules to govern power marketing decisions; and that Santa Clara had no legitimate claim of entitlement to low-cost federal power warranting due process protection. For the reasons stated below, there is no need for this Court to review these rulings.

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*Pursuant to 42 U.S.C. § 7295(c) we have substituted the Secretary of Energy for the Secretary of the Interior and the Administrator, Western Area Power Administration for the Administrator, Bureau of Reclamation. Hereinafter we shall refer to the relevant federal officers collectively as the "Secretary".

### i. The Ruling Below That Certain Power Marketing Decisions Were Committed to Agency Discretion Is Correct, Consistent with This Court's Decisions, and Not Suitable for Review by This Court.

In its petition for certiorari Santa Clara contends that the Ninth Circuit erred in ruling that certain decisions of the Secretary concerning the marketing of CVP power among preference customers are committed to agency discretion.

On the contrary, in reaching its conclusion the court below simply and properly applied, to a particular kind of agency decision under a particular statute, the principles already developed by this Court to determine whether decisions are committed to agency discretion by law within the meaning of section 5(a)(2) of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2). No further development by this Court of principles of decision governing the application of APA section 5 is necessary. Moreover, even if the further development of such rules of decision was considered desirable by this Court, this case does not present the issue in a simple and straightforward manner. The issue presented by Santa Clara's petition is clouded because it carries with it a narrow, technical question of statutory construction—whether section 5 of the Flood Control Act of 1944, 16 U.S.C. § 8255, applies to power sales from the Central Valley Project in California.

Section 5 of the APA, the judicial review section, exempts from judicial review agency actions where

> " . . .
> (1) statutes preclude judicial preview; or
> (2) agency action is committed to agency discretion by law." 5 U.S.C. §§ 701(a)(1)-(2).

The court below correctly concluded that the second exemption applied in this case, that is, that Congress committed



to the Secretary's discretion the decision on whether to sell scarce federal power to one preference agency rather than another. 572 F.2d at 667-68.

#### A. THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT.

In a number of decisions, culminating in *Citizens To Preserve Overton Park v. Volpe,* 401 U.S. 402 (1970), this Court has previously considered the question of whether a particular agency action was "committed to agency discretion by law." As a basis for its request for certiorari, Santa Clara asserts not the need for a clearer exposition of rules of decision to govern such a question, but merely an inconsistency between the decision below and two decisions of this Court—*Overton Park, supra,* and *Barlow v. Collins,* 397 U.S. 159 (1970). However, the court below expressly cited and followed the principles developed by this Court in *Overton Park.* See 572 F.2d at 666. As to *Barlow v. Collins,* this Court did not there consider whether a particular decision was "committed to agency discretion by law" but whether "statutes preclude judicial review" within the meaning of APA section 5(a)(1), 5 U.S.C. § 701(a)(1)—an entirely different question. Thus there is no inconsistency between the decisions of this court and the ruling below, and no need for further review of this issue.

#### B. THE COURT BELOW CORRECTLY RULED ON THE JUDICIAL REVIEW ISSUE.

Considering Santa Clara's *Overton Park* argument in more detail, the City asserts that two statutory provisions, the preference clause of the Reclamation Act of 1939, 43 U.S.C. § 485h(c), and section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s, provide "law to apply" to decisions

on marketing power among preference customers and concludes that such decisions are reviewable. See *Citizens To Preserve Overton Park v. Volpe, supra,* 401 U.S. at 410. The court below correctly ruled that these statutes do not provide an adequate standard for review.

With respect to the Reclamation Act of 1939, the only statute applicable by its terms to Central Valley Project power, Santa Clara's argument is simply untenable. The provision of the Act on which Santa Clara relies provides in pertinent part:

> "That in said sales or leases preference shall be given to municipalities and other public corporations or agencies . . . ."

Santa Clara's position is that the clause means that all "similarly situated" municipalities must be sold some CVP power if the Secretary sells any power to one of them. The City's interpretation does violence to the plain language of the statute and no legislative history is proffered to support this strained interpretation. The plain language of the preference clause of 43 U.S.C. § 485h(c) requires only that public entities be given a preference over private entities when power generated at a federal reclamation project is offered for sale. It does not require that all or a group of preference customers be treated equally or that all of a group of potential preference customers receive an allotment. Neither does it say that all customers desiring electric power should be sold power, nor does it say that when one preference customer buys electric power all "similarly situated" customers must be given an opportunity to buy power. After careful scrutiny the court below concluded that the statute and its legislative history are absolutely silent as to what shall happen when one preference entity challenges



the Secretary's decision to discriminate against it in favor of other preference entities. 572 F.2d at 668.

Santa Clara's fall-back position is also without merit and carries with it a narrow and technical question of whether certain provisions of the Flood Control Act of 1944 apply to CVP power. The City argues that the directive in 16 U.S.C. § 825s to distribute electric power in such manner "as to encourage the most widespread use thereof . . . consistent with sound business principles . . .," is applicable to CVP power sales. The Court of Appeals charitably characterized this proposition as "questionable", 572 F.2d at 668, since the Flood Control Act does not by its terms apply to the Central Valley Project, but found it easier to resolve the question of whether this statutory language provided an adequate standard for judicial review.* *Id.*

Even if we assume for the sake of argument that the provisions of the Flood Control Act are applicable in this case, the Court of Appeals' conclusion that the "most widespread use . . . consistent with sound business principles" language is "too vague and general to provide law to apply", 572 F.2d at 668, is reasonable and consistent with the decisions of this Court. Santa Clara argues merely that geography is the crucial factor the Secretary must take into account in determining whether power is marketed so as to encourage "widespread use." Santa Clara next urges, entirely without support in the Record, that it is "in the

*Because the Department of the Interior, as a matter of discretionary departmental policy, has apparently considered the guidelines set forth in 16 U.S.C. § 825s (which by its specific terms applies solely to flood control projects) as relevant to the marketing of power from reclamation projects, Santa Clara urges that this constitutes a binding administrative rule which provides a standard for judicial review. PGandE has maintained, to the contrary, that the Interior Department's interpretation is not binding on it. *Wilbur v. United States,* 281 U.S. 206, 213-17 (1930), and thus its interpretation can provide no standard for judicial review.

heart of the geographic area that Congress intended to be benefitted by CVP." Santa Clara Petition at 12. The City concludes that this Court must review the Circuit Court's decision. Assuming *arguendo* but with difficulty the proposition that in passing the Flood Control Act Congress intended anything about a reclamation project such as CVP, the City offers no legislative history in this Court to support its unduly restrictive interpretation of the Flood Control Act provision in question, just as it offered none in the court below. There is none; the statute in question is quite open-ended. It does not provide guidelines describing the type of marketing scheme to be adopted to achieve "the most widespread use" of electric power. As observed by the court below the statute's directive could be interpreted in many different ways, see 572 F.2d at 668. Moreover, in this instance the agency which markets federal power is in a better position to determine how best to achieve "widespread use" of federal power. The Ninth Circuit's rejection of Santa Clara's interpretation is eminently reasonable and needs no review by this Court.

In its closing paragraphs on the topic of judicial review the City asserts that even if the court below correctly concluded that it had no power to measure the Secretary's marketing program against either 43 U.S.C. § 485h(c) or 16 U.S.C. § 825s, it erred in not recognizing that it had power to measure his program against equal protection notions inherent in the due process clause of the Fifth Amendment. Santa Clara Petition at 15-16. The simple answer to this contention is that the District Court declined to rule on the City's equal protection claim 418 F.Supp. at 1257, Santa Clara did not appeal from that decision, and the Ninth Circuit is not accustomed to considering issues neither addressed by a District Court nor raised in an appellant's



opening brief. *See Gibhard v. S.S. Hawaiian Legislator,* 425 F.2d 1303, 1306 n.1 (9th Cir. 1970); *see also* 9 Moore, *Federal Practice* ¶ 228.02[2.-1] at 3755 (2d ed. 1975). In any event, Santa Clara's equal protection argument is entirely without merit. *Dandridge v. Williams,* 397 U.S. 471, 487 (1970).

## II. The Ninth Circuit's Interpretation of the Publication Requirements of the Administrative Procedure Act Is Consistent with the Decisions of This Court and Need Not Be Reviewed.

Santa Clara asserts that the decision of the Ninth Circuit Court of Appeals improperly applies the rulemaking and public information sections of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553 and 552(a)(1) respectively. In support of its petition for review of this part of the Ninth Circuit's decision, the City contends that: (1) the Ninth Circuit misapprehended the facts as alleged by the City; (2) the decision of the Ninth Circuit with respect to the applicability of the publication provisions of the APA was incorrect and in conflict with decisions of this Court and decisions of the Fourth and District of Columbia Circuit Courts; and (3) the Ninth Circuit erred by not ruling that the Department of Energy Organization Act, 42 U.S.C. § 7101 *et seq.*, compels the Secretary to follow the rulemaking provisions of the APA before marketing any CVP power. As shown below, the Ninth Circuit correctly understood Santa Clara's allegations, correctly applied the Administrative Procedure Act to the facts of this case in a manner consistent with the decisions of this Court, and the rulings below are not affected by the Department of Energy Organization Act. Accordingly there is no reason why this Court should review the second question presented in Santa Clara's petition.

### A. THE NINTH CIRCUIT UNDERSTOOD THE CITY'S CONTENTIONS AND PROPERLY RULED ON THEM.

Notwithstanding that Santa Clara's only contention in the District Court was that § 3(a)(1) of the Administrative Procedure Act, 5 U.S.C. § 552(a)(1), requires the Secretary to *formulate* rules of procedure respecting the marketing of CVP power, and notwithstanding that Santa Clara argued at length in the Court of Appeals that there was no plan for marketing CVP power, the City now argues in its petition to this Court that its contention all along has been that the Secretary had a "crystallized power marketing policy with respect to CVP, which has [sic] never made known." Santa Clara Petition at 17. Santa Clara argues that because the Ninth Circuit misapprehended the City's petition, certiorari should be granted.

As a rule, this Court does not grant certiorari merely to consider whether a lower court properly understood the facts in the record. Moreover, the City's new argument that there existed an unpublished "crystallized power marketing policy with respect to CVP" amounts to no more than a tardy concession of a point made by the other parties to this case, namely, that in 1964 the Secretary decided to market power in a certain way. The Ninth Circuit was aware of the existence of the plan. See, e.g., 572 F. 2d at 669. However, for the APA to mandate publication of the plan thus developed, the plan, or "policy" if the City prefers, must be more than a plan or "policy" covering a single project. The publication requirements of § 3(a)(1)(D) of the APA are expressly limited to no less than "substantive rules of *general* applicability" and "statements of *general* policy." There are at least 149 federally-owned hydroelectric facilities other than the 10 which comprise the



Central Valley Project.* Thus, the decision of the Ninth Circuit properly applies APA section 3(a) to the facts of this case. The Ninth Circuit did not misapprehend Santa Clara's factual allegations concerning the existence of a marketing "policy" for CVP power; it understood them perfectly well.** There is therefore no reason for further review of the matter.

### B. THE CIRCUIT COURT'S INTERPRETATION OF THE PUBLICATION PROVISIONS OF THE APA WAS CORRECT AND CONSISTENT WITH THE DECISIONS OF THIS COURT.

Santa Clara contends as a ground for certiorari that the ruling below concerning the publication provisions of the APA conflicts with the decision of this Court in *Morton v. Ruiz*, 415 U.S. 199 (1974), as well as decisions of the Fourth and District of Columbia Circuit Courts, principally, *W. G. Cosby Transfer & Storage Co. v. Froehlke*, 480 F.2d 570 (4th Cir. 1973) and *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964). However, the ruling below is completely consistent with *Ruiz*, and any conflict between the decision below and *Cosby* and *Gonzalez* is not significant.

In *Ruiz* this Court examined a general policy of the Bureau of Indian Affairs which was purported to have nationwide effect. The Court held that the Bureau failed to comply with 5 U.S.C. § 552(a)(1)(D), a publication provi-

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*In its petition the City observes that as of January 1976 there existed 159 federal hydroelectric projects with a combined capacity of 27,700,528 kw. Santa Clara Petition at 5. However, only 10 of these projects with a combined capacity of 1,587,744 kw are part of the Central Valley Reclamation Project. See *Hydroelectric Power Resources of the United States Developed and Undeveloped* 118-21 (1976)

**Significantly Santa Clara did not move for rehearing in the Circuit Court on the ground that the Court misapprehended the facts as alleged by the City.

sion of the APA requiring the publication of "substantive rules of *general* applicability" and "statements of *general* policy" (emphasis added). Santa Clara did not urge in the District Court that 5 U.S.C. § 552(a)(1)(D) had any pertinence in this lawsuit. When Santa Clara, citing *Ruiz*, did argue such a contention before the Ninth Circuit, it was properly rejected. The present controversy involves a plan for marketing electric power from only a single reclamation project in California. The plan for marketing CVP power, a plan developed for that reclamation project alone, is manifestly not a "substantive rule of general applicability" nor a "statement of general policy", *see generally*, Davis, *Administrative Law of the Seventies*, § 3A at 72-75, hence it is a fundamentally different matter from that examined in *Ruiz*. Furthermore, in *Ruiz* this Court held that 5 U.S.C. § 552(a)(1)(D) required the publication of a policy which had already been memorialized by the Bureau of Indian Affairs in a confidential manual intended only for the internal use of that Bureau's personnel. Here however, respondents asked the Circuit Court to review only the District Court's ruling that 5 U.S.C. §§ 552(a)(1)(B) and (C) require the Secretary to formulate rules of procedure. As the Ninth Circuit observed, 572 F.2d at 674, *Ruiz* was inapposite because *Ruiz* involved a policy of nationwide effect which had clearly "crystallized," as evidenced by the fact that it was enshrined in the Bureau's internal operations manual. No party to the instant suit, not even Santa Clara, has alleged that a "general policy" applicable to the marketing of electric power from the numerous federal hydroelectric projects throughout the country* had crystallized but remained unpublished by the Secretary. For simi-

*There are at least 159 federal hydroelectric projects in the United States, see footnote [*] on page 11, *supra*.



lar reasons *Gardiner v. Tarr*, 341 F.Supp. 422 (D.C. Cir. 1972), another case cited by Santa Clara is inapposite.

Several other cases cited by Santa Clara, namely *Northern California Power Agency v. Morton*, 396 F.Supp. 1187 (D.C. Cir. 1975), *aff'd per curiam* 539 F.2d 243 (D.C. Cir. 1976), *W. G. Cosby Transfer & Storage Co. v. Froehlke*, 480 F.2d 498 (4th Cir. 1973) and *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964), hold that agency action can be invalidated under the publication provisions of the APA on the ground that the agency failed to publish a non-existent rule of procedure. (Compare *Ruiz, supra*, where the Court held that the Bureau of Indian Affairs had violated the publication requirement of the APA because it had not published an existing rule.) In other words, these courts have relied on § 3(a) of the APA to compel agencies to formulate rules where none exist.

Both the *Northern California Power Agency* and *W. G. Cosby Transfer & Storage* cases cited by Santa Clara rely exclusively on the earlier decision in *Gonzalez v. Freeman, supra*, as a basis for their ruling on this issue. Neither opinion offers other authority or independent analysis to support its ruling. To our knowledge *Gonzalez* was the first case to suggest that, in a context where the rulemaking provisions of the APA, see 5 U.S.C. § 553, are inapplicable, the APA § 3(a) requirement that rules be published required that rules be specially formulated for publication. However, neither *Gonzalez*, the *Northern California Power Agency* case, nor the *W. G. Cosby Transfer & Storage* case contains any discussion of the legislative history of the APA. A glance at the opinion below, 592 F.2d at 672-75, reveals that the Ninth Circuit reached its decision on the meaning of the publication requirements of APA § 3(a) only after a careful and detailed study of the legislative history of this provision of the Administrative Procedure

Act. The opinion below is the first opinion to give consideration to the issue in light of the legislative history of the statute.* The failure to consult the history of the Act in earlier rulings led to a direct conflict between these early interpretations of the publication provisions of the APA and the intent of the Congress. This flaw in *Gonzalez* and cases relying on that opinion should be obvious in any subsequent case in which the issue arises. Accordingly, review by this Court is unnecessary.

### C. THE PASSAGE OF THE DEPARTMENT OF ENERGY ORGANIZATION ACT IS NOT A BASIS FOR GRANTING THE CITY'S PETITION.

Santa Clara also relies on the rulemaking provisions of the APA. The rulemaking section of the APA, 5 U.S.C. § 553, requires federal agencies to notify the public, conduct hearings, and consider the input of interested parties before promulgating new substantive rules. However, until October 1, 1977, that section expressly exempted from the rulemaking requirement all matters "relating to . . . public property." 5 U.S.C. § 553(a)(2). The Ninth Circuit, relying on this express exemption, rejected Santa Clara's contention that the Secretary was bound to follow the rulemaking procedures mandated by 5 U.S.C. § 553. 572 F.2d at 673. Santa Clara now contends that this was error because the Department of Energy Organization Act removes the exemption relied on by the Ninth Circuit. In pertinent part the DOE Organization Act states that:

*The only basis for the ruling in *Gonzalez* were earlier decisions listed in note 15 of the opinion, 334 F.2d at 578-79. Those cases considered only the proposition that an agency should not be permitted to act against an individual when the agency *has formulated* a rule governing private conduct but has failed to give the public constructive notice of the rule by publishing it. That proposition falls short of the *Gonzalez* ruling—that an agency should not be permitted to act in a situation where it has developed no procedural rule at all. Compare *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947).



> For the purposes of this subchapter the exception from the requirement of section 553 of Title 5 provided by subsection (a)(2) of such section with respect to public property . . . shall not be available. 42 U.S.C. § 7191 (b)(3).

Relying on this provision, Santa Clara argues that the "public property" exception to the rulemaking provisions of the APA is no longer available with respect to marketing federal power. Santa Clara Petition at 21.

The passage of the Department of Energy Organization Act was never intended to have such an effect. Congress expressly prohibited a retroactive application of the terms of the Act. The Act provides that its terms shall not affect suits commenced prior to the date it takes effect (October 1, 1977), except to substitute the appropriate Department official as a party:

> "(e) Except as provided in subsection (e) of this section [providing for the substitution of the appropriate DOE official*]—
>
> (1) the provisions of this chapter shall not affect suits commenced prior to the date this chapter takes effect, and
>
> (2) in all such suits, proceedings shall be had, *appeals taken*, and judgments rendered in the same manner and effect as if this chapter had not been enacted." (emphasis added) 42 U.S.C. § 7295(e).

Not only does the Department of Energy Organization Act specifically prohibit an application of its provisions to the facts of this case, its passage undermines Santa Clara's general contention that this Court should review the question whether the rulemaking and public information sections of the APA should be made applicable to the marketing of

*Pursuant to subsection (e) we have substituted the appropriate officials on the title page of this brief.

hydroelectric power from federal reclamation projects. Congress has already answered that question by enacting as part of the DOE Act that, when the Secretary develops future rules, regulations or orders concerning the marketing of federal power "where large numbers of individuals or businesses" will be affected, he shall follow different procedural and publication requirements than are found in sections 3(a) and 4 of the APA. See 42 U.S.C. § 7191(b)-(f). Thus, even if the DOE Act could be construed to require the application of the rulemaking and publication provisions of the APA to the facts of this case, any decision by this Court with respect to the applicability of the publication and rulemaking provisions of the APA would be of extremely limited value.

### III. The Ninth Circuit's Application of the Due Process Clause Is Consistent with the Decisions of Other Courts and This Court.

The court below held that "the City has no 'property' interest in CVP power as against other preferred entities and consequently no procedural safeguards are constitutionally required in deciding between them." 572 F.2d at 676. In the final argument in its petition Santa Clara asserts that this determination by the court below denies it procedural due process protection and conflicts with decisions of this Court, other Circuit Courts and the Ninth Circuit itself. Santa Clara Petition at 22-26. The City's argument is based on the completely untenable proposition that the preference clause of the Reclamation Act of 1939, 43 U.S.C. § 485h(c), is a grant of a property interest in CVP power to preference customers by Congress. The issue presented is one of statutory construction, not the meaning or interpretation of the due process clause.* The decision below on this issue was clearly correct and fully consistent with decisions of other courts of appeals and this Court. It need not be reviewed.



The preference provision of the Reclamation Act of 1939, on which Santa Clara relies, says simply that in sales of CVP power "preference shall be given to municipalities" as opposed to certain other purchasers. The clause does not require that power be supplied to all preference agencies. As between preference customers, the clause says nothing. Hence, preference status alone does not entitle a CVP customer to electric power. *See Arizona Power Pooling Association v. Morton*, 527 F.2d 721, 730 (9th Cir. 1975) (no "preference customer has an automatic entitlement" to federal electric power). The preference clause is not a grant

*As the court below recognized, 572 F.2d at 675, the due process issue in this case is complicated by a substantial question of standing, namely, whether municipalities possess Fifth Amendment procedural due process rights. This Court has never held that municipalities possess due process rights. However, it has often denied governmental entities constitutional rights. Ever since this Court's landmark decision in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), it has been apparent that public entities which are political subdivisions of the states do not possess constitutional rights, in the same sense and to the same extent as private corporations or individuals. 17 U.S. (4 Wheat.) at 659-61. Such entities are creatures of the state, and possess no rights, privileges or immunities independent of those expressly conferred upon them by the state. *Id; Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933); see *Railroad Commission v. Los Angeles R.R.*, 280 U.S. 145, 156 (1929); *Risty v. Chicago, R.I. & P.R.R.*, 270 U.S. 378, 390 (1926). Moreover, in *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966), this Court held that even a state cannot assert a Fifth Amendment due process claim. We find it difficult, if not impossible, to understand how the City of Santa Clara can maintain a due process claim if its creator, the State of California, cannot. In any event, accepting Santa Clara's third question for review would present an added, unnecessary and "difficult", see *Aguayo v. Richardson*, 475 F.2d 1090, 1101 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974), issue for this Court to resolve.

of an intrest in CVP power to individual members of a specific group (preference customers) similar to an irrevocable offer which can be accepted by any member of the group. The Ninth Circuit's conclusion that the preference clause does not create a "legitimate claim of entitlement" to federal power is clearly consistent with the decisions of this Court.

Santa Clara claims that there is a conflict between two decisions of this Court, *Memphis Light, Gas & Water v. Craft,* ..... U.S. ....., 98 Sup. Ct. 1554, 56 L. Ed. 2d 30 (1978), and *Perry v. Sindermann,* 408 U.S. 593 (1972), and the ruling of the court below on the due process issue. The City also urges that its petition be accepted on account of a supposed conflict between the decision below and decisions of the Second and Seventh Circuits and another supposed conflict between decisions of the Ninth Circuit itself. None of the conflicts alleged by Santa Clara exists.

Three of the cases cited by Santa Clara as supposedly in conflict with the decision below involved the *termination* of services or benefits essential to the lives of the plaintiffs. *Memphis Light, Gas & Water v. Craft, supra,* involved a complete termination of residential electric service to low-income families. As other decisions presaging *Craft* have observed, a utility company's termination of residential service amounts to a direct appropriation of the property interest involved (access to the only source of gas or electricity) against which an individual, particularly one with low income, has no defense. *See Palmer v. Columbia Gas, Inc.,* 479 F.2d 153, 168 (6th Cir. 1973). Two other cases cited by Santa Clara, *White v. Raughton,* 530 F.2d 750 (7th Cir. 1976) and *Holmes v. New York City Housing Authority,* 398 F.2d 262 (2d Cir. 1968), involved a termination of welfare benefits (food and housing assistance) to indigents. As stated by this Court in the leading case in the field,



> ". . . Such benefits are a matter of statutory entitlement for persons qualified to receive them. [footnote omitted] Their termination involves state action that adjudicates important rights.
>
> ". . . .
>
> "[T]ermination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." *Goldberg v. Kelly,* 397 U.S. 254, 262-64 (1970).

The instant suit does not involve the very means by which Santa Clara lives. It is fundamentally and essentially a controversy over what wholesale rate Santa Clara will pay for electric power. Santa Clara has a contract with PGandE under which PGandE agrees to sell to the City whatever power is needed to meet the demands of the City not satisfied by the federal government. It is undisputed that buying from the federal government is less expensive than buying from PGandE. However, the City's desire to purchase lower cost power does not afford it an entitlement to property sufficient to support its due process claim. *See Holt v. Yonce,* 370 F.Supp. 374 (D.S.C. 1973), *aff'd mem.* 415 U.S. 969 (1974); *Sellers v. Iowa Power and Light Co.,* 372 F.Supp. 1169 (S.D. Iowa 1974) Nor is it the equivalent of the interest indigents and low-income families have in welfare benefits and access to residential electric power service.

Furthermore, the cases cited by Santa Clara as supposedly in conflict with the decision below are also easily distinguishable, hence the supposed conflict resolved, because Santa Clara has never been able to cite any statutory language, legislative history, or *de facto* rule which creates or recognizes a legal claim of entitlement to CVP power.

The plaintiffs in each of the cases relied on by the City were able to establish a clear entitlement to a particular governmental benefit or grant. For example, the plaintiffs in *Pence v. Kleppe,* 529 F.2d 135 (9th Cir. 1976), Alaskan natives claiming to be eligible for allotments of public lands, were able to point to the language of the General Allotment Act of 1887, 25 U.S.C. § 334, which provides that any North American native not on a reservation who "settles" land in the manner provided *"shall be entitled"* (emphasis added) to an allotment of that land. As we have seen, the preference clause of the Reclamation Act of 1939 creates no such entitlement to federal power in Santa Clara.

Similarly, it is a mistake to contend that there is a conflict between *Perry v. Sindermann, supra,* and the decision below. In *Perry* the plaintiff, a teacher whose employment contract was not renewed, based his due process claim on a *de facto* tenure policy arising from rules and understandings officially promulgated and fostered. Santa Clara does not and cannot allege the existence of rules or understandings promulgated by the Secrtary to the effect that all preference entities "similarly situated" to a preference customer receiving CVP power are also entitled to receive CVP power. Indeed, the sum and substance of Santa Clara's complaint is that no rules or understandings with regard to allocating CVP power exist or, if they do, they do not provide for a "grant" of power to each and every preference agency.

Because the Ninth Circuit's decision with respect to Santa Clara's due process claim is completely consistent with the body of decisional law made by this Court and the other federal courts, there is no reason for reviewing that decision.



## CONCLUSION

For all of the reasons above Santa Clara's petition for certiorari should be denied.

Respectfully submitted,

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